



LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2018-11]

Request for Information on Designation of Mechanical Licensing Collective and Digital Licensee Coordinator

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The U.S. Copyright Office is issuing a notice of inquiry regarding the Musical Works Modernization Act, title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”), enacted on October 11, 2018. The MMA made significant modifications to the compulsory license in section 115 of title 17 for making and distributing phonorecords of musical works (the “mechanical license”). Among the many changes to the section 115 compulsory license, the MMA calls for establishing a collective to manage a new blanket licensing system governing licensed uses of musical works by digital music providers. The Register of Copyrights is directed to designate the mechanical licensing collective and the digital licensee coordinator that will carry out key functions under the new blanket license.

The Office now solicits information to identify the appropriate entities to be designated. The information received in response to this notice of inquiry will be publicly posted, and interested members of the public may publicly comment on the submissions. After consideration of the record material, the Register will publish a notice in the Federal Register setting forth the identity of and contact information for the mechanical licensing collective and digital licensee coordinator, and the reasons for the designations.

DATES: Initial written proposals must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Written reply comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Following submission of these written comments, the Office may provide for proponents of written proposals to supplement or amend their initial submission, in accordance with specific instructions established by the Office at <https://www.copyright.gov/rulemaking/mma-designations/>. The Office reserves the option to seek additional public input prior to making a designation, to be announced by separate notice in the future. Rather than reserving time for potential extensions of time to file comments, commenting parties should be aware that the Office has already established what it believes to be the most reasonable deadlines consistent with the statutory deadlines by which it must promulgate the regulations described in this notice of inquiry.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments in response to this notice are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office's website at <https://www.copyright.gov/rulemaking/mma-designations/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov, Steve Ruwe

Assistant General Counsel, by email at *sruwe@copyright.gov*, or Jason E. Sloan, Assistant General Counsel, by email at *jslo@copyright.gov*. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”).¹ Title I of the MMA addresses the efficiency and fairness of the section 115 mechanical license for the reproduction and distribution of musical works embodied in digital phonorecord deliveries by establishing a blanket licensing system governing such uses by digital music providers.² Prior to passage of the MMA, a digital music provider seeking to use a protected musical work was required to either obtain a voluntary license from the copyright owner to use the work or obtain a compulsory license by filing a notice of intention to obtain a compulsory license on a song-by-song basis. A notice of intention could be filed with the copyright

¹ Pub. L. 115-264, 132 Stat. 3676 (2018).

² See S. Rep. No. 115-339, at 1–2 (2018) (“The current statutory scheme applies inconsistent rules that place certain technologies at a disadvantage and result in inequitable compensation variances for music creators. These inconsistencies have drawn criticism that music copyright and licensing laws are too difficult to comply with and do not adequately reward the artists and professionals responsible for creating American music.”); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 1 (2018), <https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf> (“Conf. Rep.”); see also H.R. Rep. No. 115-651, at 2 (2018) (detailing the House Judiciary Committee’s efforts to review music copyright laws).

owner or, under certain circumstances in which the owner could not be identified, with the U.S. Copyright Office.³

The MMA creates a new blanket license for the reproduction and distribution of musical works by digital music providers in the form of digital phonorecord deliveries, including permanent downloads, limited downloads, and interactive streams, and eliminates the song-by-song notice of intention process for such uses.⁴ Instead of obtaining compulsory licenses on an individual song-by-song basis, the MMA directs the Office to designate a nonprofit entity, the mechanical licensing collective (“MLC”) to administer this new blanket-licensing system starting in January 2021.⁵ As set forth in more detail below, the MLC, through its board of directors and task-specific committees, will be responsible for a variety of duties, including collecting and distributing royalties from digital music providers, establishing a musical works database relevant to the new blanket license, and administering a process by which copyright owners can claim ownership of musical works (and shares of such works).⁶

³ See 17 U.S.C. 115(b)(1), (c)(5) (2017); S. Rep. No. 115-339, at 3; U.S. Copyright Office, Copyright and the Music Marketplace 28–31 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (describing operation of prior section 115 license).

⁴ The MMA retains the ability of record companies to obtain an individual download license on a song-by-song basis. 17 U.S.C. 115(b)(3) (2018).

⁵ *Id.* at 115(d)(3)(B); *see also id.* at 115(e)(15) The MLC will begin to administer the blanket license on the “license availability date,” envisioned by the statute as January 1, 2021.

⁶ *Id.* at 115(d)(3)(C). The Copyright Office is provided with “broad regulatory authority” to conduct proceedings as necessary to effectuate the statute; in addition to a number of regulations that the Register is specifically directed to promulgate, the legislative history contemplates that the Register will “thoroughly review” policies and procedures established by the MLC. H.R. Rep. No. 115-651, at 5–6; S. Rep. No. 115-339, at 5; *see* 17 U.S.C. 115(d)(12). The legislative history further suggests that the Register promulgate the necessary regulations in a way that “balances the need to protect the public’s interest with the need to let the new collective operate without over-regulation.” H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 15.

Licensees will bear the reasonable costs of establishing and operating the new MLC. The Copyright Royalty Judges will conduct a proceeding to determine the amount of an administrative assessment fee to be paid by blanket and significant nonblanket licensees for the reasonable costs of starting up and continuing to operate the new MLC.⁷ A digital licensee coordinator (“DLC”) may be designated to represent digital music providers in the administration of the license, including by serving as a nonvoting board member of the MLC, and participating in proceedings before the Copyright Royalty Judges to determine the administrative assessment fee.⁸ To facilitate public comment, this notice sets forth a brief explanation of the designation process and key functions and responsibilities of the MLC, its board and committees, and the DLC.

A. Designation Process.

The statute directs the Register of Copyrights to designate the MLC within 270 days of enactment of the MMA.⁹ To aid in this process, the statute requires the Register to publish notice in the Federal Register soliciting information to assist in identifying the appropriate entity to serve as the MLC within 90 days of enactment. The notice must solicit information regarding potential board members of the MLC, the operations advisory committee, the unclaimed royalties oversight committee and the dispute resolution committee.¹⁰

By law, in order to be designated as the MLC, the entity should be:

⁷ 17 U.S.C. 115(d)(7)(D).

⁸ *Id.* at 115(d)(3)(D)(i)(IV), (d)(5).

⁹ *Id.* at 115(d)(3)(B)(i),

¹⁰ *Id.* at 115(d)(3)(B), (d)(3)(D)(iv)–(vi).

- A single nonprofit entity that is created by copyright owners to carry out its statutory responsibilities;
- Endorsed by and enjoying substantial support from musical work copyright owners that represent the greatest percentage of the licensor market for uses of such works in covered activities over the preceding 3 years;
- Able to demonstrate to the Copyright Office that, by the license availability date, it will have the administrative and technological capabilities to perform the required functions; and
- Governed by a board of directors that is composed of a mix of voting and non-voting members as directed by the statute.¹¹

If no entity meets all of these statutory criteria, the Register must designate as the MLC the entity that most nearly fits these qualifications.¹² After 5 years, the Register will commence a periodic review of this designation.¹³

The Register is also directed to designate the DLC not later than 270 days after the enactment date, following substantially the same procedure described for designation of the MLC.¹⁴ Unlike the MLC, in the event the Register is unable to identify an entity that fulfills the criteria for the DLC, the Register may decline to designate a DLC.¹⁵

Under the statutory selection criteria, the name and affiliation of each board member and each committee established by the MLC must be solicited by the Register as part of the designation process.¹⁶ The legislative history states “the Register is expected

¹¹ *Id.* at 115(d)(3)(A), (d)(3)(D)(i).

¹² *Id.* at 115(d)(3)(B)(iii).

¹³ *Id.* at 115(d)(3)(B)(ii); *see also* H.R. Rep. No. 115-651, at 6 (noting that continuity is expected to be beneficial so long as the designated entity has “regularly demonstrated its efficient and fair administration,” whereas evidence of “fraud, waste, or abuse,” or failure to adhere to relevant regulations should “raise serious concerns” regarding whether re-designation is appropriate), S. Rep. No. 115-339, at 5–6 (same).

¹⁴ 17 U.S.C. 115(d)(5)(B).

¹⁵ *Id.* at 115(d)(5)(B)(iii).

¹⁶ *Id.* at 115(d)(3)(B)(i).

to allow the public to submit comments on whether the individuals and their affiliations meet the criteria specified in the legislation; make some effort of its own as it deems appropriate to verify that the individuals and their affiliations actually meet the criteria specified in the legislation; and allow the public to submit comments on whether they support such individuals being appointed for these positions.”¹⁷ Accordingly, as addressed below, the Copyright Office expects interested members of the public to comment upon the proposed governance board in response to this inquiry.

Similar to the endorsement criteria discussed below, the statute does not preclude prospective board members, vendors, or other affiliates of a prospective MLC from being included in submissions from multiple competing entities. Indeed, based on the statutory criteria requiring representative of certain publisher or songwriter associations to serve as non-voting board members, there may be some representatives that might logically serve on the board of any proposed MLC.¹⁸ Similarly, while the statutory language authorizes the MLC to arrange for services of outside vendors, nothing suggests that such a vendor must offer exclusive services to that MLC candidate (let alone one that is yet-to-be designated).

B. MLC Duties and Functions.

¹⁷ H.R. Rep. No. 115-651, at 5; S. Rep. No. 115-339, at 5; Conf. Rep. at 4; *see* H.R. Rep. No. 115-651, at 26 (“This requirement is not waivable by the Register and is not subject to the alternate designation language.”); S. Rep. No. 115-339, at 23 (same).

¹⁸ *See* 17 U.S.C. 115(d)(3)(D)(i).

The MMA enumerates a number of functions for the MLC.¹⁹ The MLC must be a single nonprofit entity created by copyright owners and endorsed by musical work copyright owners, and it must possess the administrative and technological capabilities necessary to carry out a wide array of responsibilities in administering blanket licenses.²⁰ This administrative role includes accepting or rejecting notices of license, and exercising authority to terminate licenses when the licensee is in default.²¹ The MLC has 30 days to reject a notice in writing, listing with specificity why such notice was rejected, either because it does not meet the statutory requirements or applicable regulations,²² or if the digital music provider has had a blanket license terminated by the collective within the past three years.²³ The MLC will also accept notices of nonblanket activity; that is, a notice that the licensee has been engaging in making digital phonorecord deliveries of musical works without using the blanket license, from significant nonblanket licensees.²⁴

For digital music providers that are blanket licensees, the MLC will receive reports of usage, and collect and distribute royalties for covered activities.²⁵ A key aspect of the MLC's collection and distribution responsibilities includes identifying musical works and copyright owners, matching them to sound recordings (and addressing disputes), and ensuring that a copyright owner gets paid as he or she should. To that end,

¹⁹ *Id.* at 115(d)(3)(C)(i)–(iii) (enumerating thirteen functions, in addition to permission to administer voluntary licenses).

²⁰ *Id.* at 115(d)(3)(A)(i)–(iii); *see also id.* at 115(d)(3)(B)(iii).

²¹ *Id.* at 115(d)(3)(F).

²² *Id.* at 115(d)(2)(A)(iii)(I).

²³ *Id.* at 115(d)(2)(A)(iii)(II), and (d)(3)(F).

²⁴ *Id.* at 115(d)(3)(F), (e)(23).

²⁵ *See generally id.* at 115(d)(3)(C)(i).

the MLC will create and maintain a free, public database of musical work and sound recording ownership information. The MLC will administer processes by which copyright owners can claim ownership of musical works (and shares of such works), and by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners on a market share basis after a required holding period. The MLC unclaimed royalties oversight committee is tasked with establishing policies and procedures for such distributions, subject to the approval of the MLC board of directors.

To fulfill its responsibilities, the MLC is statutorily authorized to invest in relevant resources, and arrange for services of outside vendors and others, to support the activities of the MLC.²⁶ It may engage in legal and other efforts to enforce rights and obligations set forth under the license, including by filing bankruptcy proofs of claims for amounts owed under licenses, and by acting in coordination with the digital licensee coordinator.²⁷ The MLC may be audited by copyright owners due royalties from the MLC, and so must maintain records of its activities and engage in and respond to audits.²⁸ And, the MLC may audit licensees.²⁹

The MLC may also administer voluntary licenses issued by, or individual download licenses obtained from, copyright owners only for reproduction or distribution rights in musical works for covered activities and the MLC shall charge reasonable fees

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; *see also id.* at 115(d)(3)(L).

²⁹ *Id.* at 115(d)(4)(D).

for such services.³⁰ But the MLC may only issue blanket licenses for digital uses pursuant to section 115(d)(1), and administer blanket licenses for reproduction or distribution rights in musical works for covered activities.³¹

The MLC is authorized to initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment that will fund the MLC activities. The MLC may gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms for the section 115 license. And, finally, the MLC may initiate and participate in proceedings before the Copyright Office with respect to the foregoing activities.³²

C. MLC Board.

The board of the MLC shall consist of 14 voting members and 3 nonvoting members.³³ Ten voting members shall be representatives of music publishers to which songwriters have assigned exclusive rights of reproduction and distribution of musical works with respect to covered activities, and none of which may be owned by, or under common control with, any other board member. Four voting members shall be professional songwriters who have retained and exercise exclusive rights of reproduction and distribution with respect to covered activities with respect to musical works they have authored. One nonvoting member shall be a representative of the nonprofit trade association of music publishers that represents the greatest percentage of the licensor

³⁰ *Id.* at 115(d)(3)(C)(iii).

³¹ *Id.* at 115(d)(3)(C)(ii).

³² *Id.* at 115(d)(3)(C)(i).

³³ For the statutory requirements regarding the board described in this paragraph, *see* 17 U.S.C. 115(d)(3)(D)(i).

market for uses of musical works in covered activities, as measured for the 3-year period preceding the date on which the member is appointed. One nonvoting member shall be the digital licensing coordinator, if one has been designated, or otherwise, the nonprofit trade association of digital licensees that represents the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 full calendar years. One nonvoting member shall be a representative of a nationally recognized nonprofit trade association whose primary mission is advocacy on behalf of songwriters in the United States.³⁴

As the legislative history notes, “[s]ervice on the Board or its committees is not a reward for past actions, but is instead a serious responsibility that must not be underestimated. . . . It has been agreed to by all parties that songwriters should be responsible for identifying and choosing representatives that faithfully reflect the entire songwriting community on the Board.”³⁵

The MLC board is authorized to adopt bylaws for the selection of new directors subsequent to the initial designation of the MLC.³⁶ The Presidential Signing Statement accompanying enactment of the MMA states that directors of the MLC are inferior officers under the Appointments Clause of the Constitution, and that the Librarian of Congress must approve each subsequent selection of a new director.³⁷ It also suggests

³⁴ *Id.*

³⁵ S. Rep. No. 115-339, at 5.

³⁶ 17 U.S.C. 115(d)(3)(D)(ii).

³⁷ Statement on Signing the Orrin G. Hatch–Bob Goodlatte Music Modernization Act, 2018 Daily Comp. Pres. Doc. 692 (Oct. 11, 2018), <https://www.gpo.gov/fdsys/pkg/DCPD-201800692/pdf/DCPD-201800692.pdf> (“MMA Signing Statement”).

that the Register work with the MLC, once designated, to address issues related to board succession.³⁸

An individual serving as an officer of the MLC may not, at the same time, also be an employee or agent of any member of the board of directors of the collective or any entity represented by a member of the board of directors.³⁹

Not later than one year after the date on which the MLC is initially designated, the MLC shall establish publicly available bylaws to determine issues relating to the governance of the collective. The MLC bylaws shall address the length of the term for each MLC board member, the staggering of the terms of the board members, a process for filling a seat on the board that is vacated before the end of the set term, a process for electing a board member, and a management structure for daily operation of the collective.⁴⁰

D. MLC Committees.

The MMA requires the board to establish three committees, and the Office to solicit names of prospective committee members in this notice. The statute does not address whether members may serve on multiple committees or whether members of the board may also serve on a committee.

Operations Advisory Committee. The MLC board of directors is required to establish an operations advisory committee consisting of not fewer than six members to make recommendations to the board concerning the operations of the collective,

³⁸ *Id.*

³⁹ 17 U.S.C. 115(d)(3)(D)(viii).

⁴⁰ *Id.* at 115(d)(3)(D)(ii).

including the efficient investment in and deployment of information technology and data resources.⁴¹ This committee is required to have an equal number of members who are musical work copyright owners, to be appointed by the MLC board, and representatives of digital music providers, to be appointed by the DLC.⁴²

Unclaimed Royalties Oversight Committee. The MLC board is required to establish and appoint an unclaimed royalties oversight committee consisting of ten members, five of which shall be musical work copyright owners and five of which shall be professional songwriters whose works are used in covered activities.⁴³ This committee is responsible for establishing policies necessary to undertake a fair distribution of unclaimed royalties.⁴⁴

Dispute Resolution Committee. The MLC board of directors is required to establish and appoint a dispute resolution committee consisting of not fewer than 6 members, which shall include an equal number of representatives of musical work copyright owners and professional songwriters.⁴⁵ This committee is responsible for establishing policies and procedures for copyright owners to address disputes relating to ownership interests in musical works, which shall include a mechanism to hold disputed funds pending the resolution of the dispute.⁴⁶

E. The DLC.

⁴¹ *Id.* at 115(d)(3)(D)(iv).

⁴² *Id.*

⁴³ *Id.* at 115(d)(3)(D)(v).

⁴⁴ *Id.* at 115(d)(3)(J)(ii).

⁴⁵ *Id.* at 115(d)(3)(D)(vi).

⁴⁶ *Id.* at 115(d)(3)(K).

The MMA also calls for the establishment of a digital licensee coordinator (“DLC”) to carry out key functions under the new blanket license.⁴⁷ The DLC is tasked with coordinating the activities of the licensees. The DLC shall make reasonable, good faith efforts to assist the MLC in its efforts to locate and identify copyright owners of unmatched musical works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications and conducting in-person outreach activities with songwriters. The DLC is authorized to gather and provide documentation for, and participate in proceedings before, the Copyright Royalty Judges to determine the administrative assessment to be paid by digital music providers. Further, the DLC may initiate and participate in proceedings before the Copyright Office with respect to the blanket mechanical license.

II. Request for Proposals and Related Information

At this time, the Copyright Office solicits information to assist in identifying the appropriate entities to serve as the MLC and DLC. The MMA also directs the Register to promulgate multiple other regulations with respect to the operation of the revamped blanket mechanical license and operation of the MLC, regarding, *inter alia*, the form of the notices of license and notice of nonblanket activity,⁴⁸ usage reports and adjustments,⁴⁹

⁴⁷ See generally *id.* at 115(d)(5)(C).

⁴⁸ *Id.* at 115(d)(2)(A)(i), (d)(6)(A)(i).

⁴⁹ *Id.* at 115(d)(4)(A)(iv).

information to be included in the musical works database,⁵⁰ requirements for the usability, interoperability, and usage restrictions of that database,⁵¹ and the disclosure and use of confidential information.⁵² The Office will solicit public comment regarding those subjects through future notice(s) and therefore present commenters should focus their statements on information relevant to the designation processes.⁵³

A. Mechanical Licensing Collective.

The Office hereby requests proposals for designation as the MLC that include the identities of all members of a proposed board of directors and the various committees, along with contact information for the collective. Such proposals should identify the proposed board members' relevant background and affiliations so that interested parties can submit comments to the Register addressing whether the parties meet the statutory requirements set forth in 17 U.S.C. 115(d)(3)(D).

The Office requests that proposals for the MLC designations include the following information, organized by the categories below.

1. Administrative and Technological Capabilities.

The following questions are directed at identifying an entity that can best perform the duties outlined in section 115(d)(3)(C) of the MMA.

⁵⁰ *Id.* at 115(d)(3)(E)(ii)–(iii).

⁵¹ *Id.* at 115(d)(3)(E)(vi).

⁵² *Id.* at 115(d)(12)(C).

⁵³ The Office is contemplating whether it may aid the process to solicit initial public comments on some of these issues in advance of the final designation. The Office notes, however, that the MMA explicitly contemplates that the MLC and DLC may participate in such proceedings, and would not expect to conclude any proceeding(s) without affording that opportunity. *See id.* at 115(d)(3)(C)(i)(X), (d)(5)(C)(i)(IV). The Office welcomes comment on this question of timing.

a. General. The Office requests a business plan, including a statement of purpose or principles, proposed schedule, and available budgetary projections, for the establishment and operation of the proposed MLC for the first five years of its existence. In response to the more granular information requested below, this plan should include a description of the intended technological and/or business methods for: establishing and maintaining the required musical works database; administering the blanket license and collecting relevant notices, usage reports, and administrative assessments from digital music providers; administering a process by which copyright owners can claim ownership of musical works (and shares of such works); distributing royalties generated from unidentified works equitably; collecting and processing royalty payments to musical work copyright owners; and otherwise fulfilling the MLC's statutory obligations.

b. Ownership Identification, Matching, and Claiming Process. The Office solicits information tailored to the proposed MLC's ability to identify musical works (and shares of such works) embodied in particular sound recordings, and to locate the copyright owners of such musical works, including but not limited to:

- The proposed MLC's plan for matching sound recordings and musical works, including plans for developing or acquiring initial sets of data;
- An explanation of how ownership information may be populated, corrected or updated by various stakeholders and how the proposed MLC will accommodate submission of information that may vary by scale and scope depending upon the technical or business sophistication of the submitter;
- Best practices, methodologies or expertise (including manual processes), that the proposed MLC may employ for identification of copyright owners and matching of copyrighted works;
- Intended approaches to prioritization of matching efforts (including whether and how factors such as usage, royalty amounts, genre, and vintage of usage of works may guide prioritization choices);
- The proposed MLC's target goals or estimates for matching works in each of the first five years, and in the aggregate, expressed both in terms of a percentage of

the market share of musical works in covered activities, and in terms of a percentage of the works licensed for use in covered activity;

- With consideration of the statutory timeframes regarding distribution of unclaimed royalties that accrued before the license availability date, an explanation how the proposed MLC will provide adequate opportunity to engage in requisite identification and matching efforts and for copyright owners to search and claim ownership of musical works (or shares thereof);⁵⁴
- Intended approaches to address fraudulent claims, including any planned policies or procedures of the dispute resolution committee noted below, relevant institutional knowledge of its board members or prospective vendors, and intended documentation regarding claims of ownership of works or intended technological processes; and
- Any views regarding how the proposed MLC intends to interact with and address ownership information with collective management organizations that represent owners of comparable and/or associated rights.

c. Maintenance of Musical Works Database. While a well-functioning musical works database is presumed to be integral to administering the matching and claiming process described above,⁵⁵ the Office solicits additional information related to the creation and operation of this historic unified music database, specifically:

- How the proposed MLC will approach interoperability of existing or future external databases, systems and applications, including the extent to which it may adopt or engage with existing and future frameworks, standards or formats (including open standards);
- The proposed MLC's plans to utilize and interact with existing and emerging methods or standards for identification of parties and works (including hashes and fingerprint technologies);
- An explanation of how the proposed MLC will have the capability to accept, maintain, and otherwise handle large data sets, including consideration of the scale of data that the MLC will be responsible for managing;
- An explanation of how the proposed MLC intends to approach access and usage restrictions regarding the musical works database, including with respect to digital music providers, significant nonblanket licensees, authorized vendors, and other parties' timely access to data;⁵⁶

⁵⁴ *Id.* at 115(d)(3)(J).

⁵⁵ *See* Conf. Rep. at 6–7.

⁵⁶ *See* 17 U.S.C. 115(d)(3)(E)(v).

- An explanation of how the proposed MLC will approach other information technology issues, including security, redundancy, privacy, and transparency.

d. Collection and Distribution of Royalties, Including Unclaimed Accrued

Royalties. The Office seeks information related to the proposed MLC’s royalty distribution methods and capabilities. As the legislative history notes, the MLC is required to collect and distribute royalties using the information provided in usage reports on a specific schedule mandated by statute.⁵⁷ As the history further notes, there is an expectation that “[a]ll copyright owners shall have their royalties distributed fairly and no copyright owner may receive special treatment as a result of their position on the Board, its committees, or for any other reason without a reasonable basis.”⁵⁸ Specifically, the Office requests:

- The proposed MLC’s expected competence with efficient and effective payment methods, including addressing tax and other regulatory documentation for various payees and entities;
- Any planned approaches with respect to the collection and distribution of royalties collected through bankruptcy proceedings;⁵⁹
- Information about the proposed MLC’s approach to scheduling royalty payments to identified copyright owners, including whether the entirety of unclaimed royalties is intended to be distributed simultaneously;
- Views regarding whether the proposed MLC may consider holding reserve funds to address claims that may only reasonably be identified after the statutory holding period, and what if any criteria might be used to implement any such reserve practices;⁶⁰
- Any policies that the proposed MLC intends to implement with respect to undertaking a fair distribution of unclaimed royalties;⁶¹ and

⁵⁷ H.R. Rep. No. 115-651, at 12; S. Rep. No. 115-339, at 13.

⁵⁸ H.R. Rep. No. 115-651, at 12; S. Rep. No. 115-339, at 13.

⁵⁹ See Conf. Rep. at 11.

⁶⁰ 17 U.S.C. 115(d)(3)(H).

⁶¹ H.R. Rep. No. 115-651, at 13 (describing required policies, and noting “[i]t is the intent of Congress to ensure that songwriters receive their fair share of monies distributed to copyright owners under subsection (d)(3)(J), while at the same time respecting contractual relationships. To

- Any other considerations that may be relevant with respect to the distribution of claimed and unclaimed accrued royalties.

e. Investment in Resources and Vendor Engagement. The Office understands that proposals for designation as the MLC may rely on one or more vendors to “demonstrate to the Register of Copyrights that the entity has, or will have prior to the license availability date, the administrative and technological capabilities to perform the required functions of the mechanical licensing collective.”⁶² To the extent not already provided, the Office therefore seeks information about actual or potential vendors, including the specific functions to be addressed by a given vendor, the vendors’ relevant experience with clients and projects involving similar scale and type, or industry-specific knowledge. The Office requests, to the extent practicable:

- The estimated number of employees the proposed MLC intends to hire and/or engage through vendors in each of the first five years;
- The names and resumes of any key employees that the proposed MLC may have engaged to design and operate the statutorily required functions of the MLC;
- The contracts the proposed MLC has engaged in, or any funds or other items of value the proposed MLC has exchanged in anticipation of being designated as the MLC;
- Information regarding any conflicts of interests, including but not limited to disclosure of common ownership or other direct or indirect economic relationships, or prospective relationships, between board members of the MLC, their associated publishers and/or catalogs, and actual or potential vendors;
- To the extent unaddressed elsewhere, information regarding any relevant “request for information” or “request for proposals” issued by the proposed MLC and responsive submissions to the extent this information is relevant to the entity’s ability to perform the statutory functions of the MLC.

that end, payments and credits to songwriters shall be allocated in proportion to the reported usage of individual musical works by digital music providers during the relevant reporting periods. The 50% payment or credit to a songwriter referenced in subsection (d)(3)(J)(iv)(II) is intended to be treated as a floor, not a ceiling”); S. Rep. No. 115-339, at 14 (same).

⁶² 17 U.S.C. 115(d)(3)(A)(iii).

f. Funding. While the Register’s process of designating an MLC is separate from the establishment of an administrative assessment by the Copyright Royalty Judges, understanding the proposed funding for the MLC (in advance of the establishment of the administrative assessment) is important to confirming that the MLC will be ready to adequately perform its required functions by the license availability date and beyond. Further, the statute separately directs the MLC to establish procedures to guard against “abuse, waste, and the unreasonable use of funds.”⁶³ Accordingly the Office requests, for the purposes of this designation process only, and without prejudice to the future administrative assessment proceeding, to the extent available:

- The anticipated annual costs of the proposed MLC in each of the first five years (or the anticipated range of costs), itemized to the extent possible;
- Information related to the planned funding of the MLC operations prior to receipt of administrative assessment funds, including information that may relate to voluntary contributions;⁶⁴
- Information related to whether and to what extent the proposed MLC may take on debt obligations to fund its operations, and what collateral may be used to secure such debt; and
- Information regarding whether and how the proposed MLC may apply unclaimed accrued royalties on an interim basis to defray operating costs, as well as any accompanying plans for future reimbursement of such royalties from future collections of the administrative assessment, including relevant legal considerations and guidelines in the event the proposed MLC does intend to apply unclaimed accrued royalties.⁶⁵

g. Education and Outreach. The Office welcomes information regarding how a proposed MLC intends to pursue its education and outreach efforts, including how it intends to reach diverse audiences to “engage in diligent, good-faith efforts to publicize

⁶³ *Id.* at 115(d)(3)(D)(ix)(II)(bb)(BB).

⁶⁴ *See id.* at 115(d)(7)(B).

⁶⁵ *See id.* at 115(d)(7)(C):

the collective and ability to claim unclaimed accrued royalties for unmatched musical works (and shares of such works).’⁶⁶ Please reference any relevant experience of proposed board members, personnel, and potential vendors.

2. *Governance.*

The following questions are directed at identifying an entity that can best adhere to the required governance criteria outlined in section 115(d)(3)(D) of the MMA.

a. Composition. As directed by statute, the Office requests:

- The name and affiliation of each member of the board of directors described above and in 17 U.S.C. 115(d)(3)(D)(i);
- The name and affiliation of each member of the operations advisory committee described above and in 17 U.S.C. 115(d)(3)(D)(iv);
- The name and affiliation of each member of the unclaimed royalties oversight committee described above and in 17 U.S.C. 115(d)(3)(D)(v);
- The name and affiliation of each member of the dispute resolution committee described above and in 17 U.S.C. 115(d)(3)(D)(vi); and
- Proof that the proposed MLC is a nonprofit entity, not owned by any other entity that is created by copyright owners to carry out responsibilities set forth in the statute.

In responding, please also address the following topics to explain how these individuals, and the respective board or committees, meet the statutory criteria:

- The process and criteria used for selection of board and committee members;
- How the proposed songwriter board members individually and together faithfully reflect the entire songwriting community;⁶⁷
- How the proposed music publisher board members individually and together faithfully reflect the entire music publisher community;
- Whether the proposed MLC believes that the board members who are “representatives of music publishers . . . to which songwriters have assigned exclusive rights of reproduction and distribution of musical works with respect to

⁶⁶ S. Rep. No. 115-339, at 14.

⁶⁷ *Id.* at 5.

covered activities”⁶⁸ could include representatives of music publishing administrators, where copyright ownership interests are not transferred to the publisher, but remain with the songwriter(s);

- Whether board members, who are either representatives of music publishers or professional songwriters, intend to license covered activity through the proposed MLC, or whether, and to what extent, they intend to license covered activity directly with licensees; and
- With respect to the unclaimed royalties oversight committee, how the proposed members possess specific insight and knowledge about the types of owners and songwriters whose works may be susceptible to being unmatched and unclaimed.

The Office notes the Presidential Signing Statement accompanying enactment of the law indicates an expectation that the Register work with the MLC, once it has been designated, to ensure that the Librarian retains the ultimate authority to appoint and remove all directors.⁶⁹ The Office invites comment regarding how the proposed MLC intends to address issues relating to succession of board and committee members, and any other obligations that may be impacted by this statement.

b. Governance Issues. The Office further requests that prospective MLCs provide:

- Draft bylaws or other documentation regarding how the MLC will ensure that the operations of the MLC and its board are transparent and accountable;⁷⁰
- Information regarding how the proposed MLC board may identify and approach perceived or actual conflicts of interest, including with respect to applicable law and/or rules of professional responsibility, and the selection of board and committee members and individual vendors; and
- Information regarding how the MLC may approach confidential information, including board and committee member’s access to sensitive information regarding marketplace rivals.

3. Indicia of Endorsement and Support.

⁶⁸ 17 U.S.C. 115(d)(3)(D)(i)(I).

⁶⁹ MMA Signing Statement.

⁷⁰ See H.R. Rep. No. 115-651, at 5 (stressing importance of transparency “to avoid unnecessary litigation as well as to gain the trust of the entire music community”); S. Rep. No. 115-339, at 5 (same).

As noted, the MLC must be “endorsed by, and enjoy[] substantial support from, musical work copyright owners that together represent the greatest percentage of the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years.”⁷¹ The Office understands that there may be conflicting views regarding how the “greatest percentage of the licensor market” should be measured—*i.e.*, in market value, or in number of licenses. That said, the Office has made a few preliminary interpretations regarding this clause. For example, because the section 115 license applies to uses of phonorecords in the United States, the relevant market is the United States market for making and distributing phonorecords of musical works. Endorsement may be shown by including musical work copyright owners located outside the United States so long as they control the relevant rights to works played or otherwise distributed in the United States. Similarly, because the statute seeks support from “musical work copyright owners,” the relevant support should come from the parties who have a relevant ownership interest in the copyright to musical works (or shares of such works), in contrast to parties who do not possess any ownership interest in the musical work but rather the ability to administer the works.⁷² Further, the Office does not read this clause as prohibiting a musical work copyright owner from endorsing multiple prospective MLCs.

⁷¹ 17 U.S.C. 115(d)(3)(A).

⁷² Al Kohn & Bob Kohn, *Kohn on Music Licensing* 170 (4th ed. 2010) (“An *administration agreement* is an agreement between two or more people that provides one of the parties, called the *administrator*, the right to administer the music publishing activities . . . relating to the musical compositions covered by the agreement, in exchange for the payment of an administration fee. Unlike an exclusive administrator under a co-publishing agreement, the administrator under an administration agreement generally does not acquire any ownership interest in the compositions covered by the agreement.”).

The Office requests that a proposed MLC address how it interprets and satisfies this endorsement criteria, including an explanation of how the proposed MLC has calculated and documented the endorsement and substantial support of the requisite number of copyright owners.

B. DLC and its Board Members.

The Office hereby requests proposals for designation as the DLC that includes articles of incorporation, along with contact information for the collective. The Office requests that proposals include a list of proposed board members and their relevant background and affiliations. The Office further requests that proposals for the DLC designation include the following information:

- A business plan, including any statement of purpose or principles and proposed schedule for establishment and operation of the proposed DLC in the first five years of its existence;
- A detailed description outlining how the proposed DLC has or will have the administrative capabilities to perform the required functions;⁷³
- To the extent available, information regarding proposed governance structure, criteria for membership, and any anticipated dues;⁷⁴
- Information regarding how the proposed DLC intends to address issues of confidentiality as it relates to the DLC representative on the MLC board;
- Views whether a single vendor may simultaneously provide services fulfilling the statutory obligations of the DLC and the MLC;
- Information regarding how the proposed DLC intends to pursue its outreach efforts, including “reasonable, good-faith efforts to assist the mechanical licensing collective . . . by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties.”⁷⁵ Please reference any relevant experience of proposed board members, personnel and potential vendors; and
- Any other information that proposed DLC believes is relevant to demonstrate it best meets the selection criteria.

⁷³ See 17 U.S.C. 115(d)(5)(B)–(C).

⁷⁴ See *id.* at 115(d)(5)(C)(i)(I).

⁷⁵ See *id.* at 115(d)(5)(C)(iii).

Finally, the Office requests that the proposed DLC address how it interprets and satisfies the criteria that it must be “endorsed by and enjoy[] substantial support from digital music providers and significant nonblanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years.”⁷⁶ Please include an explanation of how the proposed DLC has verified, calculated, and documented such endorsement and substantial support, including how the licensee market was calculated.

III. Additional Opportunity for Public Participation

Depending on the feedback received, the Office may request additional information in the form of a public notice, directed letters inviting prospective MLCs to supplement or respond to certain information, or a public meeting or hearing.

The Office will also consider whether to utilize informal meetings to address discrete issues prior to issuing a designation by establishing guidelines for *ex parte* communications. The Office’s proceedings typically do not include discussions about the substance of a proceeding apart from the noticed phases of written comments and public hearings (although the Office does provide procedural guidance to participants). But for certain proceedings, the Office has determined that informal communications with participants can be beneficial in limited circumstances where the Office seeks specific information or follow-up regarding the public record.⁷⁷ Following that precedent, in this

⁷⁶ *Id.* at 115(d)(5)(A)(ii).

⁷⁷ *See, e.g.*, 82 FR 49550, 49563 (Oct. 26, 2017) (identifying guidelines for *ex parte* communications in section 1201 rulemaking); 82 FR 58153, 58154 (Dec. 11, 2017) (identifying

proceeding, any such communication will be so limited. The primary means to communicate views in the course of the designation process will be through the submission of written comments. In other words, informal communication will supplement, not substitute for, the written record. While exact guidelines governing *ex parte* communications with the Office regarding the designation process may be issued at a later date on <https://www.copyright.gov/rulemaking/mma-designations/>, they would be similar to those imposed by the Office for the recently concluded section 1201 proceeding.⁷⁸ For example, the participating party or parties will be responsible for submitting a list of attendees and written summary of any oral communication to the Office, which will be made publicly available on the Office's website. In sum, the Office will require that all such communications be on the record to ensure the greatest possible transparency.

Dated: December 18, 2018.

Regan A. Smith,
General Counsel and
Associate Register of Copyrights.

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guidelines for *ex parte* communications in rulemaking regarding cable, satellite, and DART license reporting practices).

⁷⁸ See U.S. Copyright Office, *Ex Parte Communications*,
<https://www.copyright.gov/1201/2018/ex-parte-communications.html>

